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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 260

CITY OF NEW BRUNSWICK, A MUNICIPAL CORPORATION; WILLIAM G. HOWELL, TREASURER OF THE CITY OF NEW BRUNSWICK; AND WILLIAM G. HOWELL, TAX COLLECTOR OF THE CITY OF NEW BRUNSWICK, PETITIONERS,

v.

UNITED STATES OF AMERICA AND UNITED STATES HOUSING CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 79) is reported in 11 F. (2d) 476; that of the District Court (R. 62) is reported in 1 F. (2d) 741.

JURISDICTION OF THIS COURT

The decree sought to be reviewed was entered on March 15, 1927. (R. 88.) The present petition was filed in this Court on May 21, 1927.

The jurisdiction of this Court to issue the writ prayed for is conferred by the Act of February 13, 1925.

QUESTION PRESENTED

The United States Housing Corporation is a New York corporation organized by direction of the President pursuant to Act of Congress and all of the stock is owned by the United States. The question presented is whether real estate, title to which is in the corporation, became subject to taxation by the State after the Housing Corporation had made a contract of sale of the real estate and the purchaser had entered into possession and paid sufficient of the purchase price to entitle him under the contract to a deed subject to a purchase-money mortgage for the balance. The District Court held that it did; the Circuit Court of Appeals, that it did not.

STATEMENT

The case was disposed of in the District Court on the pleadings, a stipulation of facts, and some oral testimony. The respondent, the United States Housing Corporation, was organized by direction of the President of the United States, pursuant to the provisions of the Act of Congress approved May 16, 1918 (c. 74, 40 Stat. 550), as amended by the Act approved June 4, 1918 (c. 92, 40 Stat. 594, 595), for the purpose of providing housing for employees of the United States and industrial workers engaged in industries connected with the national defense during the late war. (R. 41-44.)

All of its stock is owned by the United States. In furtherance of the foregoing purpose, the said corporation, in September, 1918, purchased 42 acres of land in the City of New Brunswick, taking title in its corporate name, and proceeded to develop the property as a housing project by subdividing it into blocks and lots and erecting thereon one hundred and ninety-two houses. In addition thereto, and at a cost of $124,276.71, the Corporation laid out and constructed streets, walks, curbs, gutters, and sewers, and installed gas and electric lighting. The total cost of the project was defrayed from funds appropriated by Congress, except the sum of $27,013.80, which was expended by the City of New Brunswick in installing water mains, etc. (R. 44, 45.)

Congress, by the Act approved July 11, 1919 (c. 6, 41 Stat. 35, 56), directed that the revenues received from the rentals, operation, and disposal of such war-time housing projects should be covered into the Treasury of the United States. By a subsequent Act approved July 19, 1919 (c. 24, 41 Stat. 163, 224), amending Section 5 of the original Act, entitled "An Act to authorize the President to provide housing for war needs," approved May 16, 1918 (c. 74, 40 Stat. 550, 552), it was provided as follows:

> That the power and authority herein granted shall cease with the termination of the present war as formally proclaimed by the President, except the power and authority to care for, rent, operate, and sell such

> property as remains undisposed of; * * *. All property shall be sold at its fair market value as soon as can be advantageously done, and a reasonable effort shall be made to sell the houses direct to prospective individual home owners for their own occupancy before they are offered for sale in bulk or to speculative investors. Full power and authority is hereby given to sell and convey all such property remaining undisposed of after the termination of the present war. * * * *Provided, however,* That no sale or conveyance shall be made hereunder on credit without reserving a first lien on such property for the unpaid purchase money * * *.

The corporation proceeded to sell the New Brunswick properties by entering into contracts with individual purchasers for sale on the installment plan. These contracts provided (Exhibit C, R. 53) for cash payment on the execution of the agreement and equal monthly installments thereafter with interest at 6 per cent; that after the purchaser had paid 10 per cent of the purchase price the Housing Corporation would deliver to him a special warranty deed "free from all encumbrances except as herein mentioned," and the purchaser agreed thereupon to deliver to the seller purchase-money notes and mortgages to secure the balance of the purchase price. The purchaser agreed to keep the premises in repair and to make good any loss or damage except such as might be paid for by insurance companies on account of fire. The purchaser

also agreed to keep the buildings insured, the policies to be held by the Housing Corporation as security. The contract further provided "that all taxes, assessments, water rentals, insurance, and rents shall be apportioned and adjusted between the parties hereto as of the date of this contract and all general taxes and special assessments, or installments therefor, which hereinafter become due and payable shall be paid by the purchaser." The contract did not expressly provide when the purchasers should be entitled to possession, but as a matter of fact they entered into possession as soon as the contracts were made. (R. 48.) Exhibit D (R. 57) is a schedule of these contracts showing their respective dates and the dates purchasers became entitled to deeds. The first contract bears date October 22, 1919, and they were made frequently at intervals during the latter part of 1919 and the year 1920, with one as late as November 20, 1922. The City of New Brunswick levied taxes upon this real estate for the years 1918 to 1924, inclusive. (R. 22.) The taxes for 1918 and 1919 were assessed in the name of the Housing Corporation and the taxes for the later years in the names of the respective purchasers.

At the trial the City conceded that the taxes for the years 1918 and 1919 were void. It made this concession with respect to all of the taxes for 1919 notwithstanding that as early as October 22, 1919, in respect of some of the tracts the purchaser had entered into possession and became entitled to a

deed. No such concession was made by the City for any taxes for 1920 and 1921 notwithstanding Exhibit D shows (R. 57) that many of the purchasers did not make their contracts until late in 1920 and did not become entitled to deeds until 1920 or 1921, one as late as April 29, 1924 (R. 60).

Although the purchasers were entitled to deeds, it seems that deeds have never been delivered owing to the confusion arising from the dispute over taxes. The taxes not having been paid, the City took proceedings to have the property sold for delinquent taxes, and this suit was brought by the United States Housing Corporation in October, 1922, to have the taxes declared void and the City officials enjoined from selling the property for taxes. In March, 1923, the United States was made an additional party complainant. (R. 9.)

In the District Court Judge Lynch wrote an opinion concluding that the bill should be dismissed. (R. 68.) His decree, however, did not follow that conclusion completely. It canceled all the taxes assessed for the years 1918 and 1919 (Par. 1, R. 70) and also for 1920 (Par. 2, R. 71).

The statute law of New Jersey relating to taxation is found in the Laws of New Jersey, 1918, c. 236, p. 847, entitled An Act for the Assessment and Collection of Taxes. (Revision of 1918, approved March 4, 1918.) The Act became effective the 1st day of October, 1918, and its provisions extend to proceedings thereunder on and after that date and

relate to taxes assessed for the year 1919 and subsequent years. Under this Act the property is assessed as of the 1st day of October in each year apparently for the taxes of the following calendar year. The taxability of property for any calendar year seems to be determined by its status on the 1st of October in the preceding year. Judge Lynch's decree sustained for each of the years 1921, 1922, and 1923 taxes upon designated lots for each of those years, apparently upon the theory that at the time the taxes for those years were assessed the purchasers of those lots, respectively, had become entitled to deeds (Pars. 3, 4, and 5, R. 71–74), although the application of the theory to some of the lots is not clear.

The Circuit Court of Appeals in an opinion by Judge Buffington reversed, holding that the taxes were invalid (R. 79), and its judgment canceled all taxes for the years 1918 to 1927, inclusive (R. 86, 87), except those involving certain specified lots which may be disregarded.

ARGUMENT

Of course, the State and its municipal agencies may not tax the property of the United States. *Irwin* v. *Wright,* 258 U. S. 219. It seems to be settled that where the United States has sold land but still retains the legal title, if the purchaser has fully performed all of the conditions entitling him to a patent or deed and has paid the entire purchase price, and the only thing remaining to be done is

for the United States to deliver the patent or deed, the land is subject to the taxing power of the State. The question here is whether, although the purchaser has entered into possession and become entitled to his deed but the United States still retains a lien upon the property under a "purchase-price mortgage" as security for the balance of the purchase price, the United States has such an interest or ownership as deprives the State and its municipal agencies of the power to tax the land. In the opinion of the Circuit Court of Appeals some emphasis is laid upon and effect claimed for that provision in Section 5 of the Act of May 16, 1918, authorizing the sale of this property, to the effect that "No sale or conveyance shall be made hereunder on credit without reserving a first lien on such property for the unpaid purchase money." And it is claimed that if the State has power to tax the land and the tax is a lien superior to the mortgage or lien of the United States for the balance of the purchase price, the Housing Corporation can not retain a first lien as provided in the statute. It is not clear that this provision in the statute has any real bearing on the case. It may be that the State might tax the lands, but that the taxes would not be a lien superior to the mortgage to the United States. The United States admittedly has never consented to have the State tax these lands. If by reason of the interest or ownership of the United States they are immune from State taxation, the provision of the statute

about first liens probably does not add anything to that immunity. If, on the other hand, the United States has ceased to have an interest in the land which renders it immune from State taxation, it comes within the taxing power of the State and the State may not be deprived of that power by an Act of Congress.

Admittedly the taxes for 1918 and 1919 were void because the land was then owned by a corporation, all of whose stock was owned by the United States, and no purchasers had become equitable owners on any theory. There were no valid tax liens for 1918 and 1919. The Housing Corporation certainly had no right to refuse to deliver deeds to purchasers on the ground that the land was subject to tax liens for 1918 and 1919 for the taxes were void, and, even if valid, the purchaser would not under his contract have been obligated to pay the taxes. The purchaser might have refused to accept a deed on the ground that the tax liens constituted a cloud on the title, making it unmarketable. But he was entitled to his deed if he wanted it. As to the taxes for the later years, the existence of the tax liens on the record was no valid reason why the Housing Corporation should refuse delivery of deeds to the purchasers. So far as the record shows, therefore, it seems that the purchasers are and have been entitled to deeds and that there is nothing about the tax situation which justified the Housing Corporation in refusing delivery of deeds. The case must be disposed of on the assumption that the pur-

chasers were entitled to deeds and that the tax situation did not justify withholding them, and the extent of the interest of the Housing Corporation and of the respective purchasers is to be determined on that basis.

The petitioners claim that because of the provision in the contract that general and special taxes should be apportioned the United States had consented to taxation of the land. This argument is not sound. There is nothing in the statutes relating to the case authorizing any officer of the United States to yield its sovereign immunity from the taxation of its property. All that the contract provision amounts to is an agreement in respect of the taxes in case any valid taxes should be levied.

The petitioners also contend that even though the United States had an interest in the property the State authorities had the right to tax the interest of the purchaser. We have no reason to dispute this, but it is not clear that the State has attempted to tax the interest of the purchaser or that there is any law of the State providing for such a tax or a tax on anything but the whole interest in real estate. Splitting the tax between the interest of the mortgagor and that of the mortgagee has been attempted. See *Savings & Loan Society* v. *Multnomah County,* 169 U. S. 421. But that is not what has been done in this case. The Housing Corporation does not represent the purchasers. They are not parties to this suit and the Housing Corporation and the United States have no reason to endeavor to relieve

purchasers from any proper or just tax burden imposed upon them or their interests in this land; and if it were conceded by the State authorities that the interests of the United States, its lien for the balance of the purchase price and its ownership of the land in case it is obliged to cancel contracts and resume possession for default of the purchasers, are superior to any lien of the City or State for the taxes in question, there would not be much to disagree about.

The case seems to come down to the question whether the land was immune from State taxation after the contracts had been made, the purchasers had entered into possession and become entitled to deeds, and the remaining interest of the United States consisted of a lien upon the land for the balance of the purchase price, and it would seem to make little difference whether the legal title still remained in the United States or one of its agencies as security for the debt, or whether that title had been conveyed and a purchase-money mortgage taken as security.

The question is somewhat perplexing and the opinions of Judge Lynch in the District Court (R. 62) and of Judge Buffington in the Circuit Court of Appeals (R. 79) present the two views quite clearly and forcibly. Judge Lynch reasons from the analogy of various cases which have arisen under the public land laws where it has been held, as in *Wisconsin Central Railroad Co.* v. *Price County,* 133 U. S. 496, that when the Government has ceased

to hold any such right or interest in the property as to justify it in withholding a patent from the donee or purchaser, all the conditions entitling him to a patent having been performed, and the Government does not exclude him from the use of the land, he will be treated as the beneficial owner of the land, which then becomes subject to taxation as his property. Inasmuch as the purchasers had paid their ten per cent, and there was nothing more for them to do except to give a mortgage simultaneously with the execution of the deed, the equitable title had passed to the purchasers, the United States was the holder of the mere naked title in trust for the purchasers and the land, therefore, became taxable by the local authorities.

Judge Buffington, writing for the Circuit Court of Appeals, while admitting the general principles announced by the District Court, concludes that the case presented is not one where all the purchase money has been paid or where the Government has issued an *ad interim* certificate to bridge over the delay before a patent can be issued. On the contrary, it is obvious that all the purchase money has not been paid, and the statute itself evidences and asserts the Government's purpose to retain a beneficial interest until it shall be paid by means of a first lien for the unpaid purchase money. The Government's beneficial ownership did not cease under such circumstances and so the property was immune from taxation. In *Stearns* v. *Minnesota*, 179 U. S. 223, this Court said, at page 251:

It is true, as has been held in the ordinary administration of the affairs of the land department, that whenever full payment has been made to the United States, and the full equitable title has passed to an individual purchaser or homesteader, the mere delay in furnishing to such purchaser or homesteader the legal evidence of his title does not relieve the land from ordinary state taxation. *Carroll* v. *Safford,* 3 How. 441; *Witherspoon* v. *Duncan,* 4 Wall. 210; *Wisconsin Central R. R. Co.* v. *Price County,* 133 U. S. 496; *Northern Pacific R. R. Co.* v. *Patterson,* 154 U. S. 130.

But it has also been held that until the very last moment that liens or equitable rights of the United States are extinguished, no matter how trivial or small may be the right or the lien reserved, the land is not subject to state taxation. *Railway Company* v. *Prescott,* 16 Wall. 603; *Railway Company* v. *McShane,* 22 Wall. 444; *Colorado Company* v. *Commissioners,* 95 U. S. 259; *Northern Pacific R. R. Co.* v. *Traill County,* 115 U. S. 600; *Wisconsin Central R. R. Co.* v. *Price County,* 133 U. S. 496.

See also *Mint Realty Co.* v. *Philadelphia,* 218 Pa. St. 104.

Of course a sale of land by the United States, where only 10 per cent of the purchase price is paid and 90 per cent remains to be paid in the future, and meanwhile is secured by mortgage, is quite different from the cases arising under the land laws where an entryman or purchaser has done every-

thing required by law to be done to entitle him to a formal conveyance. If the contract of sale had provided for payments in installments, the deed to be delivered only upon the completion of the payments, there would seem to be very little doubt that the land would meanwhile be free from local taxation, even though the contract allowed the purchaser to enter upon and enjoy the use of the property. While technical distinctions may be drawn between a present deed with a purchase money mortgage for the unpaid balance, and a sale upon installments, the deed to be delivered only when the installments shall have been fully paid, the practical situation, so far as the United States is concerned, is not materially different. Compare *Railway Co.* v. *McShane,* 22 Wall. 444. Congress forbade a sale upon credit without reserving a first lien for the unpaid purchase money, and that provision should be given a practical construction. That is what the Circuit Court of Appeals has attempted to do, and its reasoning is persuasive. If, however, it does not impress this Court as sound, the Government does not oppose the application for certiorari.

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AUGUST, 1927.

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